IN THE SUPREME COURT OF THE STATE OF MONTANA
CASE NO. DA 09-0659

C.A. GRENZ,
Petitioner and Appellee

-vs-

MONTANA DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION,
Respondent and Appellant,

and JOHN AND ANGELA HEITZ,
Respondents.

On Appeal from the Montana Sixteenth Judicial District Court, Garfield County
The Honorable Gary Day, Presiding
Garfield County District Court Cause No. DV-17-2008-2911

BRIEF OF APPELLEE, C.A. GRENZ

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II. STATEMENT OF THE CASE

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III. STATEMENT OF THE FACTS

Grenz does not concur with the Department's statement of the facts in that the facts stated by the Department are out of chronological sequence and do not give an accurate review of the progress of this matter through the administrative process.

Grenz was the prior lessee of the State trust land tract in question under a March 1, 1996 lease.

Section 10 of Grenz's March 1, 1996 lease provided:

> "10. COMPENSATION FOR IMPROVEMENTS. (a) If the land under this lease is sold or exchanged to a party other than the present lessee or is leased to a party while the present lessee owns improvements lawfully remaining thereon, on which the state has no lien for rentals or penalties, as herein provided, and which he desires to sell and dispose of, such purchaser or new lessee shall pay the former lessee the reasonable value of such improvements as of the time the new lessee takes possession thereof. If any of the improvements consist of approved breaking (meaning the original plowing of the land) and one year's crop has been raised on the land after the breaking thereof, the compensation for such breaking shall not exceed the sum of two dollars and fifty cents ($2.50) per acre, and that in case two or more crops have been raised on the land after the breaking thereof, the breaking shall not be considered as an improvement to the land. In case the former lessee and the new lessee

or purchaser are unable to agree on the reasonable value of such improvements, such value shall be ascertained and fixed by three arbitrators, one of whom shall be appointed by the owner of the improvements, one by the new lessee or purchaser and the third by the two arbitrators so appointed. The reasonable compensation that such arbitrators may charge for their services shall be paid in equal shares by the owner of the improvements and the purchaser or new lessee. The value of such improvements as ascertained and fixed shall be binding upon both parties; provided, however, that if either party is dissatisfied with the valuation so fixed he may within ten (10) days appeal from their decision to the Commissioner of State Lands who shall thereupon cause his agent to examine such improvements and whose decision shall be final. The Commissioner shall charge and collect the actual cost of such reexamination to the owner and new lessee or purchaser in such proportions as in his judgment may be demanded.

(b) If the former lessee does not remove the improvements on the land or begin arbitration procedures within sixty (60) days from the date of the expiration or termination of his lease, then all improvements shall become the property of the state unless the Commissioner for good cause shown shall grant the additional time for the removal thereof.

(c) Before a lease is issued for land which has formerly been under lease, the new lessee shall show to the satisfaction of the Commissioner that he had paid the former lessee the value of the improvements as agreed upon by them or as fixed and determined by the arbitrators as herein provided or that he has offered to pay the value of such improvements as so fixed and determined or that the former lessee elects to remove the improvements.

(c) [Sic] Summer fallowing (necessary cultivation done after the last crop grown) seeding, and growing crops on the land, which have not been harvested prior to March 1 next succeeding the date of sale or at the time of change of lessee, shall be considered as improvements. Their value shall be determined in the same manner as other improvements and shall be taken over by the purchaser or new lessee and paid for him as other improvements." (Exh. "A" to Affidavit of C.A. Grenz, District Court file.)

Grenz, purchased the improvements placed upon the leasehold by the prior lessee, Heitzs. Grenz then added the following improvements during his tenancy:

1 mile of new fence on the west side
Repaired 1 mile of the south fence
Placed stays in the existing north fence
Repaired the well on the property
Put in a water tank
Repaired the washed out reservoir
Put in a new sucker rod corral.

When Grenz took possession of the leasehold in 1996 there was no fence on the West side and Heitzs' cattle on their deeded land could freely graze on the trust land. (Aff. of C.A. Grenz, ¶4, District Court file)

As required by ARM 36.25.125(1), Grenz submitted an "Improvements Request Form" to the Department on April 29, 1996. (Admin. Rec. Doc. No. 14, 8th page) Prior to approving these improvements, the Department, on September 30, 1996, requested additional information and itemization of costs. (Admin. Rec. Doc. No. 14, 12th page) In response, on October 11, 1996, Grenz provided the Department with an itemization of costs, showing the cost of the new improvements as $13,897.15. (Admin. Rec. Doc. No. 14, 11th page) All of the improvements were approved by the Department on November 7, 1996. (Admin. Rec. Doc. No. 14, 8th page) The Department agrees that each of the improvements for which Grenz was not compensated were "typically the kinds of improvements

that are used in the grazing of rangeland. (Aff. of C.A. Grenz, ¶17 and Exh. D to such Affidavit).

Grenz's lease expired on February 8, 2006.

The lease was put out for competitive bid with an added stipulation that one mile of cross fence must be added by the new lessee.

Heitzs submitted a competitive bid for the new lease and, faced with the additional expense of building a cross-fence, Grenz opted not to match the bid. (Admin. Rec. Doc. 1) (Aff. of C.A. Grenz, ¶6)

March 8, 2006 (Day 0): The Department wrote Grenz informing him of the Heitzs' bid and informing him that he was "...entitled to reasonable compensation for authorized improvements you placed on these lands which you do not remove". He was instructed to provide Heitzs with a list of improvements and the values he felt they were worth. (Admin. Rec. Doc. 1)

He was further informed that if he and the Heitzs were unable to agree upon a fair price for the improvements, an arbitration process must be implemented by Grenz within 60 days of the date of the letter. The arbitration process was briefly explained (Admin. Rec. Doc. 1)

The March 8, 2006 letter ended with a summary that gave Grenz 3 options:

1. Remove the improvements from the state land; or

2. Notify the Department in writing that he had contacted Heitzs and settled upon and been paid the value of the improvements; or

3. If unable to agree upon a value, begin the arbitration process by notifying the Department in writing of the name of Grenz's arbitrators. (Admin. Rec. Doc. 1)

The letter ended by informing Grenz if he did not comply with the 60 day limit the result would be that the State would own the improvements and Grenz would forfeit compensation for the improvements. (Admin. Rec. Doc. 1)

Nowhere in the March 8, 2006 notice is the term "movable improvements" used and nowhere does it inform Grenz that Heitzs were entitled to pick and choose the improvements for which they desired to pay. To the contrary he was informed that he was entitled to compensation for any authorized improvements which he did not remove (Admin. Rec. Doc. 1) All of Grenz's improvements were authorized by the Department.(Admin. Rec. Doc. 14, 8th page)

March 21, 2006 (Day 13): As directed by the Department, Grenz wrote Heitzs providing them an itemized listing of his improvements and requesting $32,700.00 in compensation. (Admin. Rec. Doc. 2)

March 31, 2006 (Day 23): John Heitz wrote Grenz stating that he disagreed with Grenz's valuation of his improvements and offered him $10,000.00 contingent upon verification that the well worked. (Admin. Rec. Doc. 3)

April 27, 2006 (Day 50): Grenz wrote the Department informing him that Heitz did not agree as to the valuation of the improvements and that the $10,000.00 offered by Heitz was unacceptable. He stated that he wished to proceed to arbitration and supplied the Department with the name of his arbitrator, George Luther. (Admin. Rec. Doc. 4)

May 9, 2006 (Day 62): The Department wrote the Heitzs, informed them that Grenz desired to arbitrate the value of the improvements, informed them of the name of Grenz's arbitrator, and requested that the Heitzs notify the Department, in writing, of the name of their arbitrator. (Admin. Rec. Doc. 5)

May 10, 1996 (Day 63): A representative of the Department met with John Heitz and recommended that the stipulation requiring a cross-fence be removed from the lease and a grazing plan be substituted instead. He stated that Heitz had made it clear that if the cross-fence was required he would probably not sign the lease. (Admin. Rec. Doc. 6) Had Grenz not have been required to build a cross fence he would have submitted a much higher bid for the lease, however, he was not given the opportunity. (Aff. of C.A. Grenz, ¶8)

May 28, 2006 (Day 81): The Department received Heitzs' appointment of Casey Heitz as their arbitrator. (Admin. Rec. Doc. 7)

July 5, 2006 (Day 119): George Luther, Grenz's arbitrator, informed the state by letter that Brent McRae has been appointed as the third arbitrator.

July 20, 2006 (Day 134): Casey Heitz, Heitzs' arbitrator, informed the other arbitrators, that "Dad" (John Heitz) only wishes to purchase the improvements he conveyed to Grenz in 1995, that being 2½ miles of fence and the stock water well. He cited ARM §36.25.125(3) and requested that Mr. Chappell of the Department inform Grenz to immediately remove all other claimed improvements. The letter is copied to the Heitzs but not to Grenz. (Admin. Rec. Doc. 9)

August 16, 2006. (Day 161): John Heitz informed the Department that he only wishes to purchase the improvements that he transferred to Grenz and requests that Grenz be required to remove all other improvements. (Admin. Rec. Doc. 10)

August 21, 2006. (Day 166): The arbitration panel submits its report to the Department. (Admin. Rec. Doc. Nos. 13 and 14) The report of the arbitrators stated: "*Based on the intention of the new lessee, the new fence on the west side of the section, the water tank, the pump and associated pipe and wiring in the well, and the corral will not be considered in the arbitration*." (Admin. Rec. Doc. No. 14, page 5)

August 22, 2006 (Day 167): The Department wrote to Heitz requesting a detailed list and the location of all improvements that Heitz was requesting Grenz remove so that the Department could inform Grenz. (Admin. Rec. Doc. No. 11)

August 31, 2006 (Day 176): Heitz wrote the Department informing him that he wanted Grenz to remove the west mile of fence, the pipe and pump, the water tank, and the corral. (Admin. Rec. Doc. No. 12)

September 19, 2006. (Day 195): The Department wrote to Grenz and Heitz informing them of the arbitrators valuation of the improvements at $8,370.00 and enclosed a copy of the arbitrators report. The parties were informed of their right of appeal to the Department for review. (Admin. Rec. Doc. No. 12). This is the first point in the record that Grenz is informed that only a portion of the improvements were valued. (Admin. Rec. Doc. No. 15)

September 29, 2006 (Day 205) Grenz appealed the decision of the arbitrators to the Department and pointed out that, contrary to law, the arbitrators did not value all of the improvements but only those that the Heitzs wanted to purchase. (Admin. Rec. Doc. No. 16)

October 10, 2006 (Day 215): The Department informed the Heitzs and Grenz of Grenz's appeal.

May 15, 2008 (Day 799): The Department received a report from its own appraiser, Mr. Konency, stating the value of the improvements was $8,860.00, $490.00 higher than the value placed by the arbitrators. Konency valued only the improvements that the Heitzs wished to purchase, that being 2½ miles of fence, the well and the holding pond. He valued fencing at $5,500.00 per mile. His contact

notes indicate he received information that fencing costs were between $4,500.00 to $7,500.00 per mile. (Admin. Rec. Doc. No. 18)

May 29, 2008. (Day 813): The Department notified Grenz and the Heitzs that it had adopted the $8,370.00 valuation of the arbitrators. It gave Heitz 30 days to tender payment to Grenz of $8,370.00 and directed Grenz to remove the west 1 mile of fence, the pump, pipe, water tank, and corrals that the Heitzs did not want to purchase. Grenz was informed that if he did not remove the improvements within 60 days it would result in State ownership of the improvements.

Grenz subsequently filed his Petition for judicial review.

IV. THE STANDARD OF REVIEW.

This issue in this appeal is not the Department's interpretation of its rules. This legal issue determined by the District Court and on review to this Court is whether the Department adopted an administrative regulation that is contrary to Montana statute.

The interpretation and construction of a statute is a matter of law, and this court reviews de novo whether the trial court interpreted and applied a statute correctly. *State v. Triplett*, 346 Mont. 383, ¶ 13, 195 P.3d 819, ¶ 13 (Mont. 2008); *In re J.D.N.*, 347 Mont. 368, 199 P.3d 189, ¶ 8 (Mont. 2008).

The standard of review as to whether an administrative regulation is contrary to statute is stated in *Bell v. Department of Licensing*, 182 Mont. 21, 594 P.2d 331 (Mont., 1979).

> "It is fundamental in administrative law that an administrative agency or commission must exercise its rule-making authority within the grant of legislative power as expressed in the enabling statutes. Any excursion by an administrative body beyond the legislative guidelines is treated as an usurpation of constitutional powers vested only in the major branch of government." Smith v. Industrial Commission (1976), 113 Ariz. 304, 552 P.2d 1198, 1200; Swift and Co. v. State Tax Commission (1969), 105 Ariz. 226, 462 P.2d 775, 779.
>
> The courts have uniformly held that administrative regulations are "out of harmony" with legislative guidelines if they: (1) "engraft additional and contradictory requirements on the statute"; State of Montana ex rel. Charles W. Swart v. Casne (1977), Mont., 564 P.2d 983; or (2) if they engraft additional, noncontradictory requirements on the statute which were not envisioned by the legislature; Arizona State Board of Funeral Directors v. Perlman (1972), 108 Ariz. 33, 492 P.2d 694. *Bell, supra,* at 332-333.
>
> This same standard applies to the Department.
>
> "Simply put, there is no statutory authority in Title 77, Chapter 6, MCA, which disallows a lessee whose lease has been canceled from bidding on a new lease or leasing state lands. The administrative regulation which purports, in essence, to give DSL the ability to refuse to even consider a bid, 26.3.142(6), ARM, is in derogation of the cited statutes and is, therefore, unlawful to that extent. See Bick v. State (1986), 224 Mont. 455, 457, 730 P.2d 418, 420 ["[A] statute cannot be changed by administrative regulation."]
>
> We recognize the importance and great value of school trust lands to the State. See Dep't of State Lands v. Pettibone (1985), 216 Mont. 361, 702 P.2d 948. Unquestionably, in discharging their fiduciary duty to manage state trust lands according to the highest standards, the

Board of Land Commissioners and DSL, under the direction of that Board, exercise considerable discretionary powers. See §§ 77-1-202 and 77-1-301, MCA; State ex rel. Gravely v. Stewart (1913), 48 Mont. 347, 137 P. 854; State ex rel. Thompson v. Babcock (1966), 147 Mont. 46, 409 P.2d 808; Jeppeson v. Dep't of State Lands (1983), 205 Mont. 282, 667 P.2d 428.

Nonetheless, the broad discretionary powers of DSL are not without limit and are defined by the parameters of statutory requirements enacted by the legislature. See Winchell I, 764 P.2d at 1270. We hold that, because DSL refused to consider Winchell's bid pursuant to an overbroad and unlawful administrative regulation, DSL acted in excess of its jurisdiction and abused its discretion." *Winchell v. Montana Dept. of State Lands*, 262 Mont. 328, 333, 865 P.2d 249, 252 (Mont., 1993)

V. SUMMARY OF ARGUMENT.

A. The District Court correctly invalidated that portion of ARM 36.25.125(3) which allows a new grazing lessee to determine what movable improvements they wish to acquire upon the transfer of a grazing lease.

B. §77-6-302(3) does not require the removal of movable improvements upon the termination of a lease in the absence of arbitration or agreement.

C. ARM 36.25.125 does not promote the State's fiduciary administration of the trust lands in question by facilitating the transfer of grazing leases and preventing anti-competitive practices by a former lessee.

D. ARM 36.25.125 does not comply with Montana statutes which direct compensation for lease improvements.

VI. ARGUMENT

A. <u>The District Court correctly invalidated that portion of ARM 36.25.125(3) which allows a new grazing lessee to determine what</u>

movable improvements they wish to acquire upon the transfer of a grazing lease.

The portion of ARM 36.25.125(3) which the District Court invalidated and which, as a matter of law is invalid, is the provision underlined below:

> "(3) When the former lessee or licensee wishes to sell improvements and fixtures, and the new lessee or licensee wishes to purchase such improvements and fixtures, and the parties cannot agree upon a reasonable value, such value shall be determined by arbitration. When the new lessee or licensee does not wish to purchase the movable improvements and fixtures, then the former lessee or licensee shall remove such improvements immediately. Extensions for removing these improvements for good cause may be granted by the department."

The applicable statutes are as follows:

> §77-6-302. **Compensation for improvements** -- actual costs. (1) Except for the improvements described in 77-1-134, prior to renewal of a lease, the department shall request from the lessee a listing of improvements on the land associated with the lease, including the reasonable value of the improvements. This information must be provided to any party requesting to bid on the lease. Except for the improvements described in 77-1-134, when another person becomes the lessee of the land, the person shall pay to the former lessee the reasonable value of the improvements. The reasonable value may not be less than the full market value of the improvements. (Emphasis added)

> §77-6-303. **Determination of compensation**. (1) In determining the value of the improvements described in 77-6-302, consideration must be given to their original cost, their present condition, their suitability for the uses ordinarily made of the land on which they are located, and to the general state of cultivation of the land, its productive capacity as affected by former use, and its condition with reference to the infestation of noxious weeds. Consideration must be given to all actual improvements and to all known effects that the use and occupancy of the land have had upon its productive capacity and desirability for the new lessee.

The only exception for compensable improvements provided by the legislature is improvements described improvements described in §77-1-134. These are improvements upon the bed of a navigable stream.

> "§77-1-134. **Irrigation structures, utility structures, and bridges of formerly taxable land -- water rights**. (1) If an irrigation structure, a utility structure, or a bridge was placed on land that consists of the bed of a navigable river or stream, the irrigation structure, utility structure, or bridge remains the property of the original owner or the original owner's successors in interest or assignees. Access to the irrigation structures, utility structures, and bridges described in this section for the purposes of operation, maintenance, repair, enhancement, or improvement may not be impeded by the state.
> (2) The change of designation of the bed of a navigable river or stream from a taxable to a nontaxable status may not interfere with or impede the exercise of a water right, including a livestock watering right for which a claim was not required to be filed pursuant to 85-2-212 and 85-2-222."

None of the improvements placed upon the leasehold by Grenz are improvements described under §77-1-134.

Bell, supra dealt with regulations for barber school instructors. This Court addressed the addition of provisions in a regulation that do not appear in the statute.

> "The courts have uniformly held that administrative regulations are "out of harmony" with legislative guidelines if they: (1) "engraft additional and contradictory requirements on the statute"; State of Montana ex rel. Charles W. Swart v. Casne (1977), Mont., 564 P.2d 983; or (2) if they engraft additional, noncontradictory requirements on the statute which were not envisioned by the legislature; Arizona

> State Board of Funeral Directors v. Perlman (1972), 108 Ariz. 33, 492 P.2d 694." *Bell*, *supra* at 333

The Department gives a novel interpretation of §77-6-303 MCA that ignores the very wording of the statute. §77-6-303 reads:

> §77-6-303. **Determination of compensation**. (1) In determining the value of the improvements described in 77-6-302, consideration must be given to their original cost, their present condition, their suitability for the uses ordinarily made of the land on which they are located, and to the general state of cultivation of the land, its productive capacity as affected by former use, and its condition with reference to the infestation of noxious weeds. Consideration must be given to all actual improvements and to all known effects that the use and occupancy of the land have had upon its productive capacity and desirability for the new lessee.

The Department asks the Court to read §77-6-303 as stating that if an improvement is not desirable to a subsequent lessee, it is not to be compensated. If that was the intent of the legislature, it could have simply said so. Rather than providing that consideration must be given "to all actual improvements", the legislature would have simply said "consideration will be given only to the improvements that the new lessee desires".

§77-6-303(1) does not provide that "the desirability of the improvement" to a new lessee is what is to be considered. Rather it provides that "...all known effects that the use and occupancy of the land have had upon its [the lands] productive capacity and desirability to the new lessee" It is the desirability of the

land to a new lessee that is to be considered, not the desirability of any particular improvement.

In construing a statute, this Court's function is "simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or to omit what has been inserted." *In re J.D.N*, *supra*, at ¶ 14.

The Court first attempts to construe a statute according to its plain meaning. If the language of the statute is unambiguous, no further interpretation is necessary. *Rausch v. State Compensation Ins. Fund*, 311 Mont. 210, ¶ 33 54 P.3d 25, ¶ 33 (Mont. 2002)

In enacting a law, the Legislature is presumed to have understood the ordinary and elementary rules of construction of the English language. *Hunter v. City of Great Falls*, 313 Mont. 231, 61 P.3d 764, ¶ 25 (Mont., 2002).

This Court may not insert into a statute language which has been omitted by the legislature. §1-2-101, MCA; *MacMillan v. State Compensation Ins. Fund*, 285 Mont. 202, 208, 947 P.2d 75, 78 (Mont., 1997).

Nowhere in either §77-6-302(1) or §77-6-303 did the Montana legislature except from valuation "movable improvements", nor did it limit compensation to only those improvements that the new lessee desired to purchase. If the legislature had intended to do so it would have been quite simple for them to add that

exception. It did not do so. It exempted only improvements described under §77-1-134.

Plainly, the Department in adopting ARM 36.25.125(3) engrafted additional, noncontradictory requirements on the statute which were not envisioned by the legislature. Doing so was beyond the regulatory power of the Department. *Bell*, *supra* at 332.

The District Court correctly invalidated that portion of ARM 36.25.125(3) that barred compensation for "movable improvements" that the new lessee did not desire to purchase and this Court should sustain the ruling of the District Court.

B. §77-6-302(3) does not require the removal of movable improvements upon the termination of a lease in the absence of arbitration or agreement.

§77-6-302(3) provides, as follows:

> "Upon the termination of a lease, the department may grant a license to the former lessee to remove the movable improvements from the land. Upon authorization, the movable improvements must be removed within 60 days or they become the property of the state unless the department for good cause grants additional time for the removal. The department shall charge the former lessee for the period of time that the improvements remain on the land after the termination of the lease."

What §77-6-302(3) authorizes is for a lessee to apply to the Department to remove movable improvements. In order to do so, the lessee must obtain a license from the Department to do so. The granting of the license is discretionary in the

Department in that the statute provides that the Department "may" grant the license. If the Department does not grant the license to remove the movable improvements, the lessee would receive compensation for the improvements under the provisions of §77-6-302(1). If the license is granted, the lessee has 60 days in which to remove the improvements. The lessee must pay rental for the period that the improvements remain on the land during that 60 day period. If the lessee does not remove the improvements within the 60 day period, the improvements become the property of the State and the lessee does not receive compensation for the improvements.

That is what the statute states. It does not state, as the Department contends, the all lessees are required to remove movable improvements from the leasehold within 60 days. If that is what the legislature intended, it would not have mentioned anything about a "license" or have given the Department discretion in granting the license. It would simply have stated that a lessee must remove removable improvements within 60 days or forfeit them to the State. That clearly is not what the statute states.

If the Department's tortured reading of the statute is correct, what happens to a lessee who applies to the Department to remove removable improvements and the Department, exercising its discretion, denies the license? Are the movable improvements then forfeited to the State without compensation? That would be the

result if the questioned provisions of ARM 36.25.125(3) are upheld by this Court. The State could deny the license, the new lessee could decline to purchase the movable improvements, and they would become the property of the State without compensation to the lessee. This would be the result even though the State approved every one of the improvements pursuant to ARM 36.25.125(1) and even though the express provisions paragraph 10(a) of the state lease state:

> "If the land under this lease is sold or exchanged to a party other than the present lessee or is leased to a party while the present lessee owns improvements lawfully remaining thereon, on which the state has no lien for rentals or penalties, as herein provided, and which he desires to sell and dispose of, such purchaser or new lessee shall pay the former lessee the reasonable value of such improvements as of the time the new lessee takes possession thereof."

In *State v. Triplett*, *supra*, this Court held that a statute must be interpreted as an entirety.

> "This Court construes a statute by reading and interpreting the statute as a whole, "without isolating specific terms from the context in which they are used by the Legislature." Montana Sports Shooting Ass'n, Inc. v. State, Montana Dept. of Fish, Wildlife and Parks, 2008 MT 190, ¶ 11, 344 Mont. 1, ¶ 11, 185 P.3d 1003, ¶ 11 (internal citations omitted). "Statutory construction is a holistic endeavor and must account for the statute's text, language, structure and object." State v. Heath, 2004 MT 126, ¶ 24, 321 Mont. 280, ¶ 24, 90 P.3d 426, ¶ 24 (internal quotations and citations omitted). We must also "read and construe each statute as a whole so as to avoid an absurd result and to give effect to the purpose of the statute." Infinity Ins. Co. v. Dodson, 2000 MT 287, ¶ 46, 302 Mont. 209, ¶ 46, 14 P.3d 487, ¶ 46 (internal quotations and citation omitted). *Triplett*, *supra* at ¶ 25

The Department's interpretation of §77-6-302(3) "isolates specific terms from the context in which they are used by the Legislature" and provides for a potential absurd result. An interpretation of §77-6-302(3) is not required in that "the language of the statute is unambiguous, and no further interpretation is necessary". *Rausch*, supra at ¶ 33

C. ARM 36.25.125(3) does not promote the State's fiduciary administration of the trust lands in question by facilitating the transfer of grazing leases and preventing anti-competitive practices by a former lessee.

Evertz v. State, 249 Mont. 193, 815 P. 2d 135, (Mont. 1991) cited by the Department has nothing to do with the issues before this Court. The Court's reference in *Evertz* that a lessee could "chill" the bidding process was in relation to a lessee demanding replacement value of improvements rather than their fair market value. *Evertz*, *supra* at 139. The issue in the instant case is not whether Grenz's improvements were valued at replacement cost or fair market value, but, rather, that, contrary to statute, a large portion of Grenz's improvements were not even considered in the evaluation process.

At page 15 and 16 of its brief, the Department argues that "by placing unlimited amounts of movable improvements upon a grazing lease, a former lessee harms the ability of the school trust to obtain competitive bids for a lease, if the new grazing lessee must reimburse the former lessee for all those movable

improvements." This argument ignores the Department's own rules. ARM 36.25.125(1) provides:

> "(1) A lessee or licensee may place improvements on state land which are necessary for the conservation or utilization of such state land with the approval of the department; however, only a single one-family residence will be permitted on each cabinsite lease. The lessee or licensee shall apply for permission prior to placing any improvements on state land on the form prescribed by the department and then in current use. Blank forms shall be available at no cost. A lessee or licensee will not be entitled to compensation by a subsequent lessee or licensee for improvements which are placed on the land after May 10, 1979, and which are not approved by the department. Proof of the date of placement of improvements may be required by the department. Any improvements or fixtures paid for by state or federal monies shall not be compensable to the former lessee or licensee." (Emphasis added)

In reality, the Department entirely controls the improvements that are placed upon State trust land. The lessee must apply to the Department to add an improvement. The improvement must be "necessary for the conservation or utilization of the state land". If it is not an improvement necessary for the conservation and utilization of the trust land, the Department would simply not authorize it. If the Department does not approve the improvement, the lessee is not entitled to compensation from the subsequent lessee.

Doesn't it follow that if the lessee requests permission to place an improvement upon the land, and the Department approves the placing of the improvement, using its stated criteria of "necessary for the conservation or

utilization of the state land", that the lessee would then be entitled to compensation for the improvement from the subsequent lessee? Every improvement that Grenz placed upon the leasehold and for which he seeks compensation, was submitted to the Department for approval and was approved by the Department, presumably because it was necessary for the conservation or utilization of the land. Under the Department's regulations, Grenz could not "over improve" the land without the Department's express concurrence and consent.

To the contrary of the Department's argument that a lessee will over improve the land and somehow discourage competitive bids, the Department's regulation ARM 36.25.125(3) and the Department's administration of this trust land will discourage competitive bids. Heitz has been permitted to eliminate the water development on the land by removing the pump, pipe and stock tank. He has been permitted to eliminate the fence between his deeded property and the state trust land and eliminate the requirement of a mile of cross fence. It is only because he adjoins the state trust land that he can do so. No other competitive bidder can do so.

The Department has created an environment in which any person now wishing to compete against Heitz, or his successors in interest, will, in addition to their bid, have to install 1 mile of fence on the west side of the State tract, place one mile of cross-fence through the middle of the tract, place the well in working

order by adding a pump and piping, and install a water tank for livestock water and install corrals for livestock handling. Using the Department's May 15, 2008 figure for fencing ($5,500.00 per mile), any competing bidder will have $11,000 in fencing expense that Heitz won't have, plus the cost of the pump, piping, water tank, and corrals. It is obvious that Heitz will have a substantial economic advantage over any other bidder, which will dissuade competitive bidders.

In addition, if the Departments ARM 36.25.125(3) is upheld, any bidder competing with Heitz would also have to stand the cost of removing the west fence, removing the cross fence, and removing the pump, piping, water tank and corrals at the end of their lease, further discouraging anyone from bidding against Heitz.

D. ARM 36.25.125(3) does not comply with Montana statutes which direct compensation for lease improvements.

The Montana legislature established a statutory method that encouraged leasehold improvements by lessees of state lands by assuring them under §77-6-302(1) and §77-6-303, that, if they lost the lease, they would be paid the fair market value of all improvements, unless, pursuant to §77-6-302(3) they opted to apply to the Department for a license remove improvements which they had made.

It provided that if the new lessee and former lessee could not agree on the value of the improvements, the value would be determined by appraisers. If the

parties were not satisfied with the appraisal, they could have the Department value the improvements, and, if still unsatisfied, they could have the District Court review the matter. What the legislature did not provide is that the new lessee could pick and choose the improvements they wished to purchase and there is good reason for not giving the new lessee this power.

A lessee is much more likely to make improvements when he is assured that he will recover their value when the lease is terminated. If he is subjected to the whim of the new lessee as to whether or not he is going to be reimbursed, he is more reluctant to provide improvements. The new lessee will not be faced with purchasing excessive or useless improvements, since, commencing in 1974, in order to be entitled to reimbursement, a lessee must obtain the approval of the Department for each improvement the lessee places upon the state land.

The instant case is a classic case of why the legislature did not give the new licensee the power to pick and choose improvements. Heitz had been the lessee of the land prior to Grenz securing the lease in March of 1996. This section of State school trust land adjoins Heitzs' deeded lands on the west side. There was no fence on the west side of the State tract. Livestock on Heitzs' land could freely roam and graze on the State trust land. In effect, Heitzs had physically incorporated the State trust land into their ranch.

In 1996, for Grenz or any other competing bidder to utilize the school trust land, they would need to go to the expense of erecting a mile of new fence along the Heitz border to protect the State trust land from livestock grazing on the Heitz property. The cost to Grenz of installing that fence in 1996 was $4,500.00. (Admin. Rec. Doc. No. 14, 11th page) Thus, anyone wishing to bid against the Heitzs for this section of state trust land knew they would have an additional $4,500.00 expense for fencing if they wanted to use the land.

Now, Heitz has once again been awarded the bid and, under the authority of the Department's ARM 36.25.125(3), and not under the authority of any statute, Heitzs have elected not to have the boundary between his deeded land and the State trust land fenced. Again he will be able to incorporate the State trust land into his adjoining property with no fencing expense to them. On the other hand, Grenz as the departing lessee, is not being reimbursed the fair market value of the fence he installed on the west boundary in 1996, even though §77-6-302 required the new lessee to pay him the full market value of his improvements, even though §77-6-303 requires that consideration shall be given to <u>all</u> improvements, even though the State reviewed and approved Grenz's installation of the fence as a necessary improvement, even though the fence protected the state trust land from grazing by Heitzs' livestock on Heitzs' adjoining deeded lands, and even though Section 10 of Grenz's lease with the State provided that he would be compensated

for the improvements he made. Grenz is not receiving one penny for this improvement he made with the consent of the Department, and, to the contrary, the Department seeks to require him to incur the expense of tearing out and removing this fence.

Surely that is not what the legislature envisioned or intended under the provisions of §77-6-302, §77-6-303 and §77-6-306 MCA. Rather than encouraging lessees of state trust lands to make useful improvements to the land, ARM 36.25.125(3) inhibits the making of improvements since the lessee is not assured that they will be reimbursed for their improvements and may have to stand the cost of removing an improvement.

What the Department has accomplished by ARM 36.25.125(3) is to give an adjoining landowner the upper hand in leasing school trust lands. Future competing bidders to the Heitzs will once again have the expense of installing one mile of new fence on the west side of the state trust land. 13 years ago, that cost was $4,500.00, In 2008, the Department's own appraiser determined that the fencing cost was at least $5,500.00, and that expense will likely increase by the time that this lease comes up for renewal. Any bidder competing against the Heitzs will also have the expense of redeveloping the well and installing a stock tank. If ARM 36.25.125(3) is upheld, any new lessee will also face the potential expense of having to remove the west side fence if they subsequently lose the lease.

To further exacerbate the situation, when the lease was let for bid in 2005, the Department added a provision that the successful bidder would have to install a mile of new cross fence in the middle of the section. The expense of adding this fence made the renewal of the lease unattractive to Grenz. This would be at least an additional $5,500 expense using the Department's appraiser's cost estimate. However, after accepting Heitzs' bid, the Department removed this cross-fencing requirement and allowed Heitzs to substitute a pasture rotation plan utilizing his adjoining deeded lands in conjunction with the state trust lands. This is a benefit that only an adjoining landowner could enjoy. Grenz was never extended the option of declining to construct the cross fence.

By refusing to reimburse Grenz for the fence on the west side and requiring him to remove it, and then be eliminating the cross fence requirement for Heitz, the Department has effectively given Heitz at least an $11,000.00 advantage over any competitive bidder in the future. Since Heitz livestock will have open access on the West side to the state trust land, a competitive bidder will have to fence the west side again and will have to install a new cross fence. Until they complete that fence, Heitzs' livestock will be able to graze the trust land. Heitzs, because they are the adjoining landowner, will not have either expense. The long range effect is to inhibit others from bidding competitively against the Heitzs, who will eventually be able to bid the lease in at a bargain price because no one will be able to compete

with their bid. This is surely not the "pure competitive bidding" that the Montana Supreme Court held in *Jerke v. State Dept. of Lands*, 182 Mont. 294, 597 P.2d 49, 51 (Mont. 1979) was necessary to meet the constitutional mandate of Article X, Section 11(2) of the 1972 Montana constitution of obtaining full market value for publicly owned lands.

The unauthorized provision of ARM 36.25.125(3) requiring the consent of the new lessee to the purchase of "movable improvements" does not promote the fiduciary responsibilities of the Department as to State trust lands. It allows the new lessee to substitute its discretion for that of the Department as to what is "a reasonable amount of improvements directly related to conservation of the land or necessary for proper utilization of it." (§77-6-301 and ARM 36.25.125(1) As applied in the instant case it permits an adjoining landowner to establish an insurmountable competitive advantage over any future bidders upon the lease, to freeze out competitors, and to basically incorporate the trust land into their adjoining deeded lands.

The Department cites §77-1-209 MCA as providing "abundant administrative discretion" to adopt the provisions of ARM 36.25.125(3). This Court, in *Winchell*, *supra*, considered a Department of State Lands administrative regulation which provided:

> "Any person who has had his lease or license cancelled and not reinstated by the board or department for any reason except nonpayment of rentals shall not be allowed to bid upon the lease or license or upon any lease or license for land managed by the department. If no other bids are received, the former lessee or licensee may be allowed to bid, but the board may reject any or all bids from a lessee or licensee who has had his lease cancelled in the past."

This Court invalidated this rule since there was no similar statutory limitation.

> "Section 77-6-108, MCA, contains certain proscriptions against those who may lease state lands. This section provides only that:
>
> No person may lease state lands, except one who is the head of a family, unless he has attained the age of 18 years. Any such person and any association, company, or corporation authorized to hold lands under lease may lease state lands and may hold more than one lease to state lands.
>
> Importantly, there is no proscription contained in the statute that one whose lease has been previously canceled may not thereafter bid on or lease state lands."
>
> Likewise, there is no such proscription in § 77-6-202, MCA, which, as discussed above, allows DSL to reject a high bid only on the basis of a written finding of violation of the standards set forth in § 77-6-205(2), MCA. Again, those standards do not contain any proscription disallowing the bid or ability to lease of one whose lease has been previously canceled.
>
> Finally, none of the various sections in Title 77, Chapter 6, MCA, pertaining to the cancellation of leases by DSL contain any provision that, once a lease has been canceled, the offending lessee may not, thereafter, bid upon or lease state lands.
>
> [3] Simply put, there is no statutory authority in Title 77, Chapter 6, MCA, which disallows a lessee whose lease has been canceled from bidding on a new lease or leasing state lands. The administrative regulation which purports, in essence, to give DSL the ability to refuse to even consider a bid, 26.3.142(6), ARM, is in derogation of the cited statutes and is, therefore, unlawful to that extent. See Bick v.

> State (1986), 224 Mont. 455, 457, 730 P.2d 418, 420 ["[A] statute cannot be changed by administrative regulation."] *Winchell*, *supra* at 251-252

The regulatory powers given to the Board under §77-1-209 are the same now as existed at the time of the *Winchell* decision. This Court, in *Winchell*, recognized that these regulatory powers are not unbridled and are, in fact, restricted the the parameters of legilative enactments.

> "Nonetheless, the broad discretionary powers of DSL are not without limit and are defined by the parameters of statutory requirements enacted by the legislature. See Winchell I, 764 P.2d at 1270. We hold that, because DSL refused to consider Winchell's bid pursuant to an overbroad and unlawful administrative regulation, DSL acted in excess of its jurisdiction and abused its discretion. We reiterate that, according to statutory authority, a high bid can only be rejected if DSL makes written findings that the high bid was too high for community standards, would cause damage to the land, or would impair long-term productivity." *Winchell*, *supra* at 252

In the instant case, as in *Winchell*, there is no statutory authority to ignore some of the authorized improvements of the prior lessee, nor is there any statutory authority for the new lessee to pick and choose improvements. Had the legislature intended to do so they would not have employed the languate in 77-6-306(1) "If the owner of "<u>any</u> improvements on state land of the type <u>authorized by law</u> that desires to sell these improvements..." [emphasis added]. They would have excepted out "movable improvements" that the new lessee did not desire to

purchase. They would not have used the phrase in §77-6-303(1) that "Consideration must be given to all actual improvements..." [emphasis added] As in *Winchell*, the Department in the instant case has exceeded the parameters of the statutory requirements.

It is ironic that the Department argues that ARM 36.25.125(3) somehow implements this Court's ruling in *Montanans for Responsible Use of School Trust v. State ex rel. Bd. of Land Com'rs*. *(Montrust I),* 296 Mont. 402, 989 P. 2d 800 (Mont. 1999). As part of its ruling, this Court invalidated former §77-6-304, MCA (subsequently repealed), which provided:

> **Removal of improvements**. The former lessee may, however, remove the movable improvements on the land and dispose of them to parties other than the lessee. If he fails to remove the improvements from the land within 60 days from the date of the expiration of his lease, all of the improvements become the property of the state unless the department for good cause grants additional time for their removal."

The holding in *Montrust I* was plainly that permitting a former lessee to leave its improvements on the trust land for up to 60 days, without compensation violated the constitutional fiduciary duties of the Land Board.

§77-6-304 gave the former lessee the right to remove movable improvements if they desired and did require compensation for the time they remained on the trust land.

This constitutional infirmity was addressed by the legislature in enacting §77-6-302(3) which required obtaining a discretionary license from the State to remove the improvements and requiring compensation for the time that the improvements remained upon state trust land.

The Department in its brief cites the following language from *Montrust I*:

> "In allowing trust lands to idle indefinitely while former and new lessees determine the value of improvements, § 77-6-305, MCA, is inconsistent with the trust's mandate that full market value be obtained for school trust lands. We hold that the specific requirement in § 77-6-305, MCA, that a new lease will not issue until the new lessee shows that the old lessee has been paid the value of his improvements is unconstitutional on its face". *Montrust I*, *supra*, at 810.

What the Department does not cite is the last sentence of the cited paragraph which held:

> "We note that our holding does not reach the requirement, in 77-6-305 MCA that former lessees be reimbursed for their improvements." *Montrust I*, *supra*, at 810

Montrust I did not address the issues before the Court in the instant case and is not supportive authority for the Department's position.

The irony is that ARM 36.25.125(3), as applied to the current case, did nothing to prevent the land from sitting idly indefinitely while the former and new lessee determined the value of the improvements. What the unauthorized regulation in fact did was prolong the valuation process.

Heitzs did not communicate until the 134th day their refusal to purchase "movable improvements" and that communication was by their arbitrator/attorney to the arbitration board. They did not communicate their intent to the Department until the 161st day. Since Grenz did not know that Heitzs were refusing to purchase the improvements he made, there was no way he could have applied to the Department for a license to remove the improvements within the 60 day statutory limit of §77-6-302(3) MCA. Since ARM 36.25.125(3) does not provide any time limit in which the new lessee must decide whether they want to acquire the "movable improvements", it renders the 60 day provisions of §77-6-302(3) impotent.

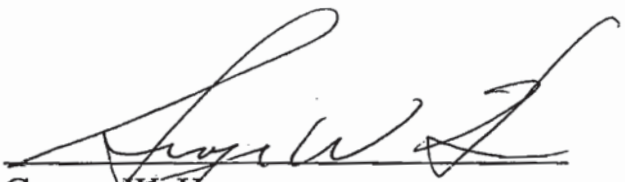
The Department was still trying to clarify with the Heitzs what improvements they didn't want to purchase on the 176th day, 10 days after the arbitration board had rendered its decision on valuation. It wasn't until the 195th day that the Department communicated to Grenz the arbitrators' decision, which revealed to Grenz that most of Grenz improvements were not even considered in the valuation. When Grenz appealed the arbitrators decision, it took the Department 698 additional days to render its decision to Grenz. During this entire period, the improvements remained on the trust land and were utilized by the Heitzs. The Department can hardly argue that ARM 36.25.125(3) somehow alleviated this Court's concerns raised in *Montrust I*.

CONCLUSION

The ruling of the District Court that the second sentence of ARM 36.25.125(3) which reads: "*When the new lessee or licensee does not wish to purchase the movable improvements and fixtures, then the former lessee or licensee shall remove such improvements immediately.*" is invalid, should be affirmed by this Court, and such portion of ARM 356.25.125(3) should be held invalid by this Court.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11(4)(d), M.R.App.P., I certify that this brief is printed with a proportionately spaced Times New Roman font of 14 points, is double-spaced and the word count calculated by Lotus Wordpro software is 8,283 words, excluding the table of contents, table of citations, certificate of compliance and certificate of service. The paper upon which this brief is printed conforms with Rule 11(1).



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing BRIEF OF APPELLEE C.A. GRENZ was, on the 5th day of May, 2010 served by U.S. Mail, postage prepaid, upon the following:

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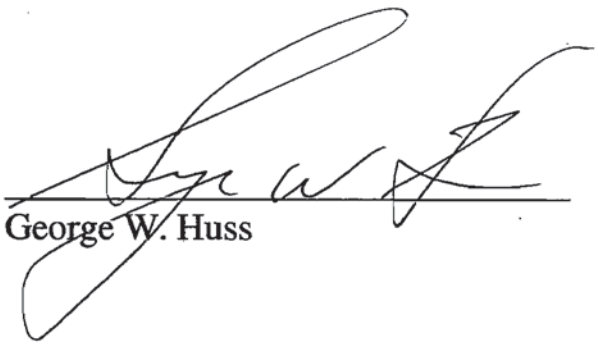

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